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NTSB Order No. EA-4845

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of June, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15344
v.)	
)	
TOM HULIHAN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator and respondent have filed cross appeals from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued following an evidentiary hearing held on December 8, 1998, and February 12, 1999.¹ By that decision, the law judge found that respondent had violated

¹The portion of the transcript containing the initial decision is attached. Both parties have filed appeal and reply briefs.

sections 91.13(a), 105.13, and 105.29(a) and (b) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 105, as set forth in the Administrator's complaint when, as pilot-in-command (PIC) of a Cessna 182A, he allowed a parachute jump to be made over a victor airway, into or through clouds and at a time when the aircraft was less than the permissible distance (as specified in the FAR) from clouds.² The law judge then reduced the period of suspension from 120 to 60 days and imposed the suspension against respondent's commercial certificate alone, not his airline transport pilot certificate (ATP) because the order of

²The regulations provide, in relevant part, as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 105.13 General.

No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft, if that jump creates a hazard to air traffic or to persons or property on the surface.

§ 105.29 Flight visibility and clearance from clouds requirements.

No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft -

- (a) Into or through a cloud; or
- (b) When the flight visibility is less, or at a distance from clouds that is less, than that prescribed....

[For purposes of the flight at issue, the requirements were 500 feet below, 1,000 feet above, and 2,000 feet horizontal from clouds.]

suspension, which was issued before respondent earned an ATP, was directed only to respondent's commercial pilot certificate.³ As discussed below, we will grant the Administrator's appeal and deny respondent's appeal.

On June 29, 1997, respondent operated an aircraft from Sanderson Field Airport, Shelton, Washington. The purpose of the flight was to allow several people to engage in a parachute jump. Among them was Norman Blanchette, a first-time jumper.⁴ Mr. Blanchette testified that there were "very heavy clouds" when he arrived at the airport that day and that the weather further deteriorated in the few hours before the aircraft departed for the jump.⁵ (Tr. at 17.) He stated that the aircraft took off in cloudy weather, went through clouds, and circled a bit.⁶ (Tr. at 18.)

When the door of the aircraft was opened in anticipation of the jump, Mr. Blanchette, along with the jumpmaster, exited the

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³The Administrator has not appealed the reduction in suspension period, but argues that, to have any meaning, the suspension must be applied to respondent's ATP certificate.

⁴He stated that he received no instruction from respondent or anyone on FAR requirements regarding cloud clearances and parachute jumps. Respondent confirmed that he did not brief him on cloud clearances. (Transcript (Tr.) at 95.)

⁵An FAA aviation safety inspector testified that the reported weather at the two closest airports showed overcast conditions consistent with Mr. and Mrs. Blanchette's testimony. (Tr. at 48-49; Exhibit (Ex.) C-5.)

⁶This was confirmed by the testimony of Judith Blanchette. (Tr. at 36-37.)

aircraft onto the wing strut and held onto the strut.⁷ He hesitated, continuing to hold on for what he estimated as several seconds, even after the jumpmaster told him to jump. Eventually the jumpmaster pried Mr. Blanchette's hands off the aircraft and the parachutists began a free fall. (Tr. at 26-27, 30.)

According to Mr. Blanchette, when he jumped, the conditions were cloudy - he could not see the ground below him. (Tr. at 28.) He went through clouds, not a hole in the clouds. (Tr. at 28-29.) This also was confirmed by Mrs. Blanchette, who was waiting near the jump zone. (Tr. at 35, 37.)

Mr. and Mrs. Blanchette stated that a video was made by Blue Skies that day and given to them as part of the jump package. It accurately depicted most of the events leading to the jump and the actual jump, except for the scene of the aircraft taking off, which they believe had been "dubbed" into the tape. They came to this conclusion because the video shows the aircraft taking off into blue skies, which was not an accurate portrayal of the actual weather conditions during takeoff. (Tr. at 22-23, 36; Ex. C-2.) The rest of the video depicts primarily cloudy and rainy conditions.

Respondent, in turn, testified that, while some clouds were in the area, there were significant sections of blue sky and that the jumpers descended through a hole in the clouds, which he estimated to be about 1½ x 1 mile wide. (Tr. at 96-97.) He

⁷He and the jumpmaster conducted a tandem jump (they were tethered together). Another jumper with a video camera accompanied them.

stated that the video was not dubbed. It is undisputed that the jump took place over an active federal airway, v-27.

The law judge found the Blanchettes to be credible witnesses, and determined that the video and photos support their testimony. (Tr. at 121; Exs. C-2 and 3.) He further noted that weather reports from surrounding airports indicated "at best marginal VFR conditions." (Tr. at 114.) Based on the video, the law judge determined that the delay caused by Mr. Blanchette's hesitation was about 18 seconds, and that respondent should have anticipated that a first-time parachutist might hesitate when it came time to jump. (Tr. at 117.) He found that the video shows "solid undercast" under the parachutists before they actually jumped. (Tr. at 117.) Based on his evaluation of the evidence, the law judge concluded that the parachutists fell through clouds. (Tr. at 123.)

On appeal, the Administrator explains that, when she issued the order of suspension (July 21, 1998), the most advanced certificate held by respondent was a commercial pilot certificate. Between that time and the conclusion of the hearing on February 12, 1999, respondent had been issued an ATP certificate. The Administrator argues that to suspend only the commercial pilot certificate would produce an absurd result and would be contrary to precedent. We agree. For example, where a respondent argued that he should be permitted to retain his private pilot certificate when his commercial or ATP certificate was suspended, we were unpersuaded, as airman certificates are

cumulative in nature. See, e.g., Administrator v. D'Antonio, NTSB Order No. EA-4526 at 7, n.9 (1997), and cases cited therein. While it is true that the suspension order in the instant case purports to apply simply to respondent's commercial pilot certificate, that was the most advanced certificate he held at the time of the order's issuance.⁸ An applicant for an ATP certificate must hold a commercial pilot certificate - the latter is predicated on the former. It would be inconsistent with precedent to fail to apply the suspension to respondent's ATP certificate.⁹ See Administrator v. Uppstrom, 5 NTSB 1390 at

⁸Respondent claims that counsel for the Administrator did not object *per se* to the law judge's interpretation of this issue, however, counsel for the Administrator told the law judge, "[w]e don't think [respondent] can validly hold an ATP, though, if [his] other privileges have been suspended. Otherwise someone could go get a higher rating and in effect vitiate the Administrator's authority to issue a suspension." (Tr. at 107.)

He further argues that because the Administrator's order does not suspend the commercial certificate *and any other certificate held by respondent*, then the suspension may not apply to the ATP certificate. We cannot espouse his interpretation, as it would lead to a nonsensical result. While perhaps it would have been much simpler had the Administrator included the additional phrase in the order, it does not change the fact that the suspension is directed at respondent's privilege to operate an aircraft. Furthermore, his ATP certificate is dependant on the existence of the commercial certificate. Thus, arguably, respondent could not lawfully use his ATP even if his commercial certificate alone were suspended.

⁹See Administrator v. Reno, NTSB Order No. EA-3622 at 5-6 (1992), aff'd 45 F.3d 1375 (1995), where a respondent argued that a suspension should apply to his student, not commercial, pilot certificate. We stated,

It is not atypical for respondents to have upgraded their certificates between the date of the incident giving rise to the complaint and its adjudication. ... A sanction imposed against respondent's student pilot certificate would be meaningless, as he no longer

1392-93 (1986); Administrator v. Bridges, 1 NTSB 1500, 1501-02 (1972).

As for respondent's appeal, he raises objections based largely on credibility and procedural issues. First, he claims that the law judge should not have bifurcated the hearing, which allowed the Administrator to put on her case in Seattle and him to respond on a different date in Alaska. He further contends that he should have been afforded the opportunity to participate in the Seattle hearing via telephone.

Respondent, pro se before and during the hearing, had requested that the hearing be held in Anchorage, as he had moved to Alaska since the incident. He asserted that holding the hearing in Alaska would be more convenient and less costly for him. The Administrator opposed that request, seeking instead to have the hearing in Seattle, closer to the location of the event at issue and the expected witnesses. The law judge decided to bifurcate the hearing. Respondent did not object or ask to participate by telephone, but nevertheless chose not to travel to Seattle for the first part of the hearing. As such, any objection now to the law judge's decision to bifurcate the hearing rings hollow. There is no indication that the law judge abused his discretion under 49 C.F.R. § 821.37(a) in determining

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operates under that authority. Such a sanction would allow him to continue to operate as a pilot during the suspension period. That is no sanction at all.

Id., footnotes omitted.

the hearing location.

We find respondent's challenge of the law judge's credibility determinations similarly unpersuasive. It is well-settled that a law judge's credibility determination, unless arbitrary, capricious, or not in accordance with law, will remain undisturbed by the Board. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). The law judge, having the opportunity to assess witness demeanor, credited the eyewitnesses' description of the weather, reports of weather conditions at neighboring airports, and the video and photographic evidence over the testimony of respondent. That respondent would prefer the law judge to have given more weight to his testimony than to the other evidence is not enough to justify a reversal of his decision. See, e.g., Administrator v. King, 7 NTSB 1364, 1365 (1991).¹⁰

Finally, respondent argues that the law judge misapplied the law by holding respondent strictly liable for the actions of the parachutists, claiming that the parachutists delayed too long once outside of the aircraft but before release. Again, his argument is unavailing. The law judge found that the weather was marginal VFR, at best, at the time of the flight and jump, and that respondent, without allowing any time for hesitation, could not reasonably expect a first-time parachutist to accurately jump through a small

¹⁰In King, we noted that "a law judge's credibility choices 'are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations ... were put forth....'" Id., quoting Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

hole in the clouds.¹¹ According to the testimony of FAA Aviation Safety Inspector Charles Cox, if a parachutist jumped through the middle of a hole in the clouds, to be within the bounds of the FAR on this flight, it would have to be at least a 4,000 foot hole, if the hole were circular.¹² (Tr. at 51.)

We do not see that the law judge's decision to uphold the charges as alleged is contrary to precedent. In fact, the initial decision is completely consistent with Administrator v. Foss, NTSB Order No. EA-4631 at 5 (1998), where it was made clear that a pilot has a duty to determine whether a jump can and will be made within the regulatory requirements. See also Administrator v. Woermann, NTSB Order No. EA-4644 (1998).

In Foss, we noted that pilots are responsible for foreseeable FAR section 105.29 violations by parachutists, and the law judge correctly held respondent to that standard in the instant case. He found that, based on the view from the video, there did not appear to be any hole in the clouds that would have allowed for a jump in compliance with the FAR. It was entirely foreseeable that a first-time parachutist might hesitate, or that the parachutists might not be able to hit the bullseye of a relatively small clear spot in a layer of clouds.¹³

¹¹The law judge determined that Mr. Blanchette was out on the strut for 18 seconds; respondent estimated that it was 30 seconds to a minute. (Tr. at 99.)

¹²On this flight, the parachutists were required not to enter clouds, and to remain 500 feet below, 1,000 feet above, and 2,000 horizontally from clouds. (Tr. at 51.)

¹³In any event, the evidence suggests that there were fairly

Based on the foregoing, we affirm the law judge's determination that respondent allowed a parachute jump to take place over a victor airway, through a cloud.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The initial decision is affirmed in part and reversed in part, consistent with this opinion and order; and
4. The 60-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁴

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

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solid clouds beneath the aircraft even before the parachutists jumped from the aircraft.

¹⁴For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).